

KEDAH REPORT.[APPELLATE CIVIL JURISDICTION]
THORNE, WHITLEY & TERRELL, JJ.

September 4, 1931.

K. A. L. R. M. KARUPPAN CHETTY
..... (Appellant).

v.

A. R. P. L. S. P. MUTHIA CHETTY
..... (Respondent).

[KEDAH CIVIL APPEAL No. 57 of 1349]

*Deposit of title deeds—collateral security—
agreement to give a charge—equitable rights
thereunder—Kedah Civil Procedure Code, S. 119;
Kedah Courts Enactment, S. 10.*

The Appellant recovered judgment against B. C. and D. in respect of moneys due on promissory notes. B. and C. had deposited the title deeds of Surat Putus No. 19871, Surat Kechil No. 294 and Surat Putus No. 13322 as security for the Appellant's debt. The Appellant was also entitled to the benefit of a document dated the 5th Shawal 1346 being an agreement by B. and C. to execute, after the subdivision of the lands comprised in Surat Putus No. 13322 had been effected, a charge on the three grants of land. Surat Putus No. 13322 had not been subdivided. The Respondent had also recovered judgment against B. and held the title deed of Surat Kechil No. 10302 as security for his debt. After obtaining judgment the Appellant lodged a caveat against Surat Kechil No. 294 and Surat Putus No. 19871. On the same day he registered a caveat against Surat Putus No. 10302. These caveats were not registered in pursuance of any lien or charge claimed by the Appellant, but merely in pursuance of the judgment he obtained for payment of a sum of money. The Respondent did not register any caveat. Some time in 1349 the Respondent attached Surat Putus No. 19871, Surat Kechil No. 294 and Surat Putus No. 13322 in satisfaction of his judgment debt. The Appellant thereupon filed an interpleader suit against the Respondent but the Registrar dismissed the Appellant's claim. The Appellant then took proceedings against the Respondent under section 142 of the Civil Procedure Code in order to establish his claim that he had a prior interest in the lands attached by the Respondent. His claim was dismissed by the Malay Judge of the Second Division and this decision was confirmed by the Judge of the First Division.

On appeal to the Court of Appeal—

Held, that the agreement to execute a charge was not a document registrable under section 146 of the Land Enactment.

Held further, that although the deposit of the title deeds with the Appellant did not constitute a lien such as is recognised by S. 80 of the Federated Malay States Code, and to which protection can be given by caveat, the agreement to execute a charge in favour of the Appellant conferred upon him equitable rights to which effect should be given by the combined operation of s. 119 of the Kedah Civil Procedure Code and s. 10 of the Kedah Courts Enactment which applies to the equitable principles prevailing in the Colony.

Accordingly *held* that the lands comprised in Surat Putus No. 19871, Surat Kechil No. 294 and Surat Putus No. 13322 were only liable to attachment by the Respondent subject to the equities existing between the Appellant and B. and C. by virtue of the agreement.

APPEAL.

de Buriatte for the Appellant.*J. J. Saunders* for the Respondent.*Cur. Ad. Vult.*

The judgment of the Court of Appeal (Thorne, Whitley and Terrell, JJ.) was delivered by—

TERRELL, J.—This matter has come up before the Court of Appeal in the following way. On 11.9.47 the Appellant recovered judgment against Tunku Saudah, Tunku Mahiran, and one Bibi binti Abdul Ghani in respect of moneys due on Promissory Notes. On the same day the Respondent also recovered judgment against the two Tunkus and one Sheriffa Fatimah binti Syed Hussain.

The Tunkus had previously deposited with the Appellant the title deeds of Surat Putus No. 19871 and Surat Kechil No. 294, both registered in the name of Tunku Saudah and of Surat Putus No. 13322 which was registered in the name of Wan Jah but to which the two Tunkus were beneficially entitled. These title deeds the plaintiff purported to hold as security for his debt.

Similarly, the Respondent held the title deed of Surat Kechil No. 10302.

The appellant was also entitled to the benefit of a document dated 5th day of Shawal 1346—(Exhibit B). This was an agreement by the Tunkus to execute in favour of the Appellant a charge on Surat Putus No. 19871, Surat Kechil No. 294 and Surat Putus No. 13322 as soon as the latter Surat Putus had been subdivided by the Land Office. Such charge when executed was to have been in substitution for the Promissory Notes.

It appears that notwithstanding the lapse of three years the Land Office has not yet subdivided Surat Putus No. 13322, and the position as regards the execution of a charge remains as it was when Exhibit B was executed.

After obtaining judgment the Appellant, by leave of the Court, registered a caveat against Surat Kechil No. 294 and Surat Putus No. 19871 on the 25th Ramthan 1347. On the same day he registered a caveat against Surat Putus No. 10302. Ten days later he registered another caveat against Surat Kechil No. 294, though what was the object of this second caveat is not quite clear. No caveat was registered against Surat Putus No. 13322 which was registered in the name of Wan Jah.

It is to be noted that these caveats were not registered in pursuance of any lien or charge claimed by the Appellant but merely in pursuance of the judgment he obtained for payment of a sum of money.

The Respondent does not appear to have registered any caveat.

In 1348 both Appellant and Respondent took proceedings against the Tunku Saudah and one Tunku Mohamed Jiwa as the latter claimed some interest in Surat Kechil No. 10302 and Surat Putus No. 19871.

For the purposes of these proceedings the Appellant and the Respondent joined hands and succeeded in defeating the Tunku Mohamed Jiwa's claim. As a result the Court held that so far as Appellant was concerned Tunku Saudah had a disposable and attachable interest not only in Surat Putus No. 19871 but also in Surat Kechil No. 10302 in which the Respondent would have appeared to have a special interest by virtue of the deposit of the title deed of the Lot with him. With similar inconsistency the Respondent was declared to have the right to execute against Surat Putus No. 19871 in respect of which the Appellant had a special interest. Tunku Mohamed Jiwa appears to have made no claim in respect of Surat Kechil No. 294 or Surat Putus No. 13322.

Some time later in 1349 the Respondent attached Surat Putus No. 19871, Surat Kechil No. 294 and Surat Putus No. 13322 in satisfaction of his judgment debt. The Appellant thereupon filed an interpleader suit against the Respondent, but on 16.7.49 the Assistant Registrar dismissed the Appellant's claim and gave the Respondent permission to sell the lands in question by public auction. This order for sale has not yet been carried out.

One point to be noticed in connection with the Assistant Registrar's order is that the Respondent obtained leave to execute upon Surat Putus No. 13322 which was registered in the name of Wan Jah. The Assistant Registrar therefore looked beyond the registered owner under the Land Enactment and recognized a judgment-creditor's right to execute in respect of the judgment-debtor's equitable interest in land registered in another person's name. In the opinion of the Court the Assistant Registrar was *prima facie* correct, as Section 119 of the Civil Procedure Code provides that execution may issue against property.

"belonging to the judgment-debtor whether the same be held by him or by another person in trust for him or on his behalf." It is conceded that the two Tunkus had a beneficial equitable interest in Surat Putus No. 13322.

The Appellant thereupon took proceedings against the Respondent under Section 142 of the Civil Procedure Code. This is what is known under the similar provision of the Federated Malay States Civil Procedure Code as an "objection" suit. The object of the proceedings was to establish the Appellant's claim that he had a prior interest in the lands attached by the

Respondent. The Respondent claimed the benefit of Section 154 of the Civil Procedure Code, which provides, *inter alia*, that attaching creditors shall share the proceeds of any execution *pro rata*.

The Plaintiff's claim was dismissed by the Malay Judge of the Second Division and his decision was confirmed by the Judge of the First Division. The Appellant now appeals to the Court of Appeal for the reversal of the previous judgments.

Before proceeding to consider the validity of the Appellant's claim there are one or two preliminary matters to be noticed.

The first point is that, in the opinion of the Court, Exhibit B was not a document registrable under Section 146 of the Land Enactment. Section 146 reads as follows:—

"If any person wishes to offer security in his land to another person for the performance of any action or for any contract, similar provisions to those set forth in this part shall apply."

It was argued that Exhibit B shews that the grants are deposited as security for the fulfilling of a contract and that the document was therefore registrable and not having been registered was not admissible as a charge on land and was only admissible as evidence of debt. The Court does not consider this construction tenable. To begin with, the previous Section, which deals with charges to secure the payment of money, indicate that Section 146 refers to a contract to secure something other than the payment of money. Secondly, if Exhibit B was not registrable under Section 146, it was not registrable under any other section unless it purported "to be a document of charge" within the meaning of Section 137. In the opinion of the Court, Exhibit B was an agreement to give a charge at some future date and did not purport to be a charge *in presenti*.

It follows therefore that the Appellant never had a charge. Nor has he a lien such as is recognised by Section 80 of the Federated Malay States Land Code, and to which protection can be given by caveat. There is no section in the Land Enactment corresponding to section 80 of the Federated Malay States Land Code and Section 141 of the Kedah Civil Procedure Code which refers to attachment of property subject to a lien and re-enacts a similar provision in the Federated Malay States Civil Procedure Code is inapplicable in Kedah where such a lien has at present no existence under the Land Enactment.

A further point is that raised by paragraph 8 of the Respondent's Reply to the Appellant's appeal, namely, that the Appellant is barred by the decision of the Assistant Registrar from raising the question now before the Court, on the ground that it is *res judicata*. This argument appears to have been accepted by the

learned Judge of the First Division in his written judgment, but, in the opinion of the Court, several of the elements necessary to establish *res judicata* are entirely lacking. To begin with, the question of priorities between the Appellant and the Respondent was not in issue in the proceedings against Tunku Mohamed Jiwa. The matter was never litigated nor did the Assistant Registrar purport to give any decision on the subject. No case was set up by the Respondent that there was any estoppel by reason of the Appellant's conduct in the proceedings mentioned, and, apart from that, there is no evidence that the Respondent changed his position as a result of such conduct and without such evidence no estoppel could arise.

Lastly, it was argued by the Respondent that the effect of the judgment obtained by the Appellant on 11.9.47 was to merge all his rights, including his rights under Exhibit B, in the judgment so obtained. It appears to the Court that the only effect of the judgment was to convert the Appellant's simple contract debt by virtue of the Promissory Notes into a judgment debt and that the Appellant's rights, if any, under Exhibit B were entirely unaffected.

Having disposed of these preliminary matters the Court finds that the Respondent's right to issue an attachment against lands rests on Section 119 of the Civil Procedure Code. The essential portions of this section have already been set out and there can be no doubt that all that can be attached in execution is "property belonging to the debtor." There is nothing whatever in the Civil Procedure Code to justify the argument that an execution creditor can attach anything more than property which the debtor himself would be in a position to dispose of. It must be remembered that an attachment is not an assurance, nor is an execution creditor in the position of a purchaser for value without notice. He is simply in the position of being able, by permission of the Court, to seize and sell any disposable interest which debtor may have.

Now, it is quite clear that if the debtors themselves had attempted to dispose of the lands the title deeds of which the Appellant held, they could have been restrained by injunction from committing a breach of their covenant in Exhibit B.

In paragraph 3 of that agreement they bind themselves 'not to charge or sell the aforesaid lands to any other person.' They had also by paragraphs 1 and 2 of Exhibit B agreed to execute in favour of the Appellant a charge as soon as Surat Putus No. 13322 had been subdivided. The Tunkus were, therefore, only in a position to dispose of these lands subject to the equitable interest of the Appellant therein and, in the opinion of the Court, an execution creditor could be in no better position.

The principle that an execution creditor can only seize the debtor's beneficial interest in land, whatever it may be, has been recognised in the Colony where Section 617 of the Straits Settlements Civil Procedure Code is similar in effect to Section 119 of the Kedah Civil Procedure Code, (see *Ng Boo Bee vs. Khaw Joo Choo & Ors*; 14 S.S.L.R., p.90) and by Section 10 of the Kedah Courts Enactment it is provided that in matters of Tort and Contract the principle of law and equity in force for the time being in the Colony of the Straits Settlements shall be applied by the Court of Appeal and there can be no doubt that applying such principles the equitable rights of the Appellant under Exhibit B should be given effect to.

Both the learned Judges in the Court below appear to have been strongly influenced by the illustrations which form part of Section 137 of the Land Enactment. The second illustration deals with the case of a chargee, who has failed to register his charge, being postponed to an execution creditor. The third illustration deals with the case of an unregistered chargee who has parted with the indicia of title to the charger being postponed to a subsequent chargee who has registered his charge.

The third illustration need not cause any difficulty. Quite apart from any system of registration of titles a mortgagee who parts with the indicia of title will be postponed to a subsequent mortgagee who advances money in good faith, and without notice of any prior charge.

As regards the second illustration, it must be remembered that the Civil Procedure Code of 1328 is six years subsequent to the Land Enactment and it is the Civil Procedure Code that governs the right of execution creditors.

An illustration in a previous enactment dealing with quite a different matter cannot possibly control the provisions as to execution specially laid down in a subsequent enactment. It will, however, be sufficient to point out that in the opinion of the Court the Appellant has no registrable charge and that accordingly the illustration is not applicable to the facts of the present case.

Reliance was placed by the Respondent's Counsel on various decisions under the Federated Malay States Land Code.

The Court was referred to the case of *K. M. S. Scholingam Chetty v. M. M. Mahomed Nurdin & anor.*, reported at page 197 of *Innes on Land Registration*. In that case the depositary of certain Mukim Extracts applied for leave to register a caveat, and the application was refused. Under the Federated Malay States Land Enactment the depositary of a grant or certificate of title, but not of a Mukim Extract, is enabled to register a caveat and it was argued therefore

that as there is no similar provision in Kedah Land Enactment the deposit of a Surat Putus or Surat Kechil in Kedah is in the same position as deposit of a Mukim Extract in the Federated Malay States. It is quite probable that this is the case so far as the registration of a caveat is concerned, but in the present case the Appellant did not attempt to register a caveat by virtue of any lien nor do his right as against the Respondent depend on whether he could register a caveat or not.

Another case referred to was that of *Chan Gun Lai & anor. v. Anderson Pole*, reported on page 126 of *Innes*. The plaintiffs in that case were the equitable owners of a piece of land registered in the name of Chan Pian. Chan Pian became insolvent and the defendant was appointed Receiver. The Plaintiff's suit to have themselves placed on the Register as owners against the Receiver was dismissed.

Now, as regards this case, it is to be noticed that the effect of the appointment of a Receiver was to vest in the Receiver the land registered in the name of the insolvent. There was a transmission of interest which was equivalent to an assurance and it may well be, as is frequently the case under the Bankruptcy Ordinance of the Colony, that the Receiver became entitled to a greater interest than that actually vested in the insolvent at the time of his insolvency. The principles that apply between the Receiver of an insolvent estate and persons having claims against an insolvent are quite different from those that apply between an execution creditor and persons who have claims against a debtor. Apart from this, the Court is not prepared to say that the decision would be good law in Kedah where Section 10 of the Courts Enactment might very well result in the trust imposed on the insolvent being given effect to. At the foot of this case the learned editor quotes a passage from a judgment of Lord Atkinson in the case of *Munro vs. Diacott*, (1911) A.C. at page 149. Lord Atkinson states that one of the objects of registration is that third parties who deal with owners may be protected. The Court had no doubt that this is one of the objects and need only point out that an execution creditor is not "dealing with an owner." The law merely gives him a right, without the consent of the owner, to attach any property of which the owner may happen to be possessed.

The case of *John Gardner vs. Siau Kuan Chia*, reported at page 159 of *Innes* has no application. It was an attempt to deal with mining land in a manner prohibited by Section 28 of the Mining Enactment, which declared any attempt to transfer otherwise than in accordance with the provisions of the Mining Enactment, to be void.

The cases of *Palaniappa Chetty vs. Dupire Bros.*, 1 F.M.S.L.R. 370 and *Registrar of Supreme Court vs. Keng Peng Kee*; F.M.S.L.R. vol. 1. page 80 were both cases in which a deposit of title deeds was held to take priority over an execution creditor even though he had failed to register a caveat as, under the Federated Malay States Enactment, he was entitled to do. The ground of the decision in each case was that Section 80 of the Federated Malay States Enactment recognised that the deposit of a grant or certificate of title gave the deposit a lien, and it was held that such lien came into existence from the moment of deposit even though the deposit failed to register a caveat. Both the learned Judges who tried the above cases expressed the opinion that Section 80 of the Federated Malay States Enactment introduced an exception from the general principle of registration of titles. In the latter case Woodward C.J.C. held that as a result the attaching creditor's right was subject to the lien holder's claim. Although in the present case the position is different in that there is no section in the Kedah Land Enactment recognizing a lien and in that the Appellant's claim rests not on the mere deposit of title deeds but on the equitable right to enforce an agreement to give a charge, the principle would appear to be much the same. In each case the execution creditor was only entitled to attach such interest as the debtor had. In the Federated Malay States cases the debtor's property was subject to a lien recognised by the Land Enactment and in the present was subject to an equitable interest in the Appellant to which effect must be given by the combined operation of Section 119 of the Civil Procedure Code and Section 10 of the Courts Enactment which applies the equitable principles prevailing in the Colony.

The Appellant, therefore, is entitled to succeed.

The appeal will be allowed and the judgments below reversed. The Respondent's attachment and the order for sale will be set aside. The Appellant will be entitled to a declaration that the lands held under Surat Putus No. 19871, Surat Kechil No. 294, and Surat Putus No. 13322 are only liable to attachment by the Respondent subject to the equities subsisting between the Appellant and the Tunkus Saudah and Mashiran by virtue of Exhibit B. The judgment will be prefaced by a recital that the Appellant by his Counsel undertakes to withdraw his attachment in respect of Surat Kechil No. 10302 which was deposited with the Respondent. The Respondent must pay Appellant's costs in the Court of Appeal and in both Courts below.

Appeal allowed.

Solicitors for the appellant—

Presgrave & Matthews.

Solicitors for the respondent—

Hogan & Ivens.